MOTION FILED
JUN 14 1985

No. 84-1794

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GROCERY MANUFACTURERS OF AMERICA, INC.,
A Delaware Corporation,

Appellee,

v.

JOSEPH GERACE, Commissioner, New York Department of Agriculture and Markets, and THE NEW YORK DEPARTMENT OF AGRICULTURE AND MARKETS,

Appellants,

JOHN R. BLOCK, as Secretary of Agriculture of the United States and THE DEPARTMENT OF AGRICULTURE OF THE UNITED STATES, MARGARET M. HECKLER, as Secretary of Health and Human Services of the United States, and THE DEPARTMENT OF HEALTH AND HUMAN SERVICES OF THE UNITED STATES,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

MOTION AND BRIEF *AMICUS CURIAE* OF FEDERATION OF HOMEMAKERS, INC. IN SUPPORT OF JURISDICTIONAL STATEMENT

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PRESS OF BYRON S. ADA

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MOTION OF *AMICUS CURIAE* FEDERATION OF HOMEMAKERS, INC. FOR LEAVE TO FILE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

The Federation of Homemakers, Inc., hereby moves the Court pursuant to Rule 36 for leave to file its

brief as *Amicus Curiae* in support of the Appellant, State of New York's, Jurisdictional Statement. Permission of all parties to file is unobtainable.

As set forth in the attached brief in detail, the Federation of Homemakers, Inc., makes this motion to the Court to offer its statement and reasons for noting probable jurisdiction on behalf of its consumer members and many who would support its position. This *Amicus* believes that there are major questions of federal and state laws and regulations which affect consumer welfare. The Federation offers the view of consumers which may aid the Court in its decision regarding its need to take jurisdiction.

Respectfully submitted,

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Dated: June 13, 1985

QUESTIONS PRESENTED

1. Where Congress did not preempt the regulation of food safety and health protection of all consumers of all states does Food and Drug Administration regulation 21 CFR § 101.3(e) conflict with the New York State regulation which provides added economic inferiority protection by requiring imitation labeling?

2. Does FDA's regulation violate the express imitation labeling provisions of the Food, Drug and Cosmetic Act and thus causes confusion among circuit courts interpreting food labeling cases and weakens and nullifies state food safety and protection laws and regulations?

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AMICUS CURIAE BRIEF OF FEDERATION OF HOMEMAKERS, INC. IN SUPPORT OF JURISDICTIONAL STATEMENT

Federation of Homemakers is a not-for-profit corporation organized under the laws of the District of

Columbia and has its principal office in Arlington, Virginia. It is a nationwide grass roots association of consumers with a membership of both individuals and families. The Federation represents its membership before Congressional Committees and Federal Government Agencies. It provides information to, and serves to educate its members through newsletters and statements about consumer matters, principally food and drugs. It is a volunteer organization.

THE INTEREST OF THE *AMICUS CURIAE*

The Federation of Homemakers, historically, and at the present time, advocates consumers' interests in health, nutrition and economic protection. Its standing to appear on behalf of its members and consumers generally, has been recognized by the Government Appellees over the past twenty years. The United States District Court and The United States Circuit Court of Appeals for the District of Columbia have recognized the representative standing of the Federation. Several of these matters involved foods, labeling and regulations issued by the Secretary of Agriculture and the Commissioner of the Food and Drug Administration (FDA). (*Federation of Homemakers* v. *Butz,* 466 F2d 462 [D.C. Cir. 1972] and *Federation of Homemakers* v. *Schmidt,* 539 F2d 740 [D.C. Cir. 1976]). In the first cited case, the U.S. District Court sustained the Federation's standing to sue the Secretary of Agriculture concerning the enforcement of the Wholesome Meat Act (21 U.S.C. 601 *et seq.*) and administrative regulations issued thereunder. The *Schmidt* case is part of these proceedings as legal precedent and is relied on by both lower courts in their opinions. The Federation there sought judicial review of the regu-

lation of the Commissioner of FDA [21 CFR Sec. 101.3(e)], which is the subject of this jurisdictional statement.*

The Federation as *Amicus Curiae* has a significant interest in this Court's noting probable jurisdiction as it will affect all consumers who make daily marketplace decisions between standard foods, substitutes for standard foods or imitations of standard foods. There is a need to protect the economic interests of consumers in being able to identify imitation products made from cheaper ingredients. This information is needed to gain the benefit of lower prices which those cheaper ingredients make possible. An equally important interest of this *Amicus* is to support proper FDA actions which assist consumers in being able to identify products made from less nutritious ingredients than those used in the traditional or standardized product being imitated.

This *Amicus* has the interests and concerns of consumers, nationally, in all states, not only New York. Consumers rely on state laws and regulations for their safety and health protection, as well as the federal system. Consumers in all states will be affected by the decision of the Second Circuit Court and the jurisdiction of this Court to review.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 755 F2d 993 (2nd Cir. 1985).

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* The Federation of Homemakers also filed as *Amicus Curiae* in the Eighth Circuit's consideration of the regulation in *National Milk Producers Federation* v. *Harris*, 653 F2d 339 (8th Cir. 1981).

The opinion of the United States District Court for the Southern District of New York, reversed in part by the Second Circuit Court of Appeals, is reported at 581 F.Supp. 658. Both opinions have been printed in Appendices by the parties.

STATUTES AND REGULATIONS INVOLVED

The principal statutes are The Food, Drug and Cosmetic Act (FDCA) (21 U.S.C. § 341-343; § 371); The Wholesome Meat Act (21 U.S.C. § 601 and § 678); The Poultry Products Inspection Act (21 U.S.C. § 453 and § 467e) and The New York State Agriculture and markets Law § 63. The principal regulations are Title 1, Official Compilation of Codes, Rules and Regulations of The State of New York, Part 18, and 21 Code of Federal Regulations § 101.3(e). These and other involved statutes and regulations are printed in Appendices E-K, pages 64a-86a of Appellants' Jurisdictional Statement.

STATEMENT OF CASE

The case arose on complaint of the Grocery Manufacturers of America, Inc. (GMA), a trade association, in the United States District Court (S.D.N.Y.) asking for an injunction against Appellants, New York State Department of Agriculture and Markets, and Joseph Gerace, Commissioner of the Department, to prevent the enforcement of a new state statute (Agriculture and Markets Law § 63) and regulations (1 NYCRR Part 18) which required that manufactured, imitation cheese be labeled with the word "imitation" and not the word "substitute" or some other words as permitted under The Food and Drug Administration's regulation [21 CFR § 101.3(e)].

GMA's principal arguments were that the Federal statutes and the FDA regulation conflict with New York Law § 63 and its regulation 18 and preempt them. GMA also claimed that the state laws and scheme placed an impermissible burden on interstate commerce.

New York opposed GMA's arguments and counterclaimed that there was no irreconcilable conflict between the laws and regulations. It argued that FDA's regulation was invalid and that the United States Department of Agriculture (USDA) did not effectively adopt the same regulation. The counterclaim added the Secretaries of USDA and Health and Human Services, the parent of FDA, as party defendants.

The U.S. District Court ruled that the imitation labeling law and regulation of New York were preempted under the supremacy clause and the menu and sign posting requirements in public restaurants and carry-outs placed an unreasonable burden on commerce. The U.S. Court of Appeals affirmed the violation of the supremacy clause as to the labeling law and regulation but reversed as to sign, menu and container provisions for service establishments in New York.

SUMMARY OF ARGUMENT IN SUPPORT OF JURISDICTIONAL STATEMENT

This case presents the Court with important and far reaching issues which concern many states and all consumers. The Court of Appeals decision preempting the State's authority to protect its citizens' health by regulating food products labeling seems to conflict with this Court's recent decision in *Hillsborough County,*

Florida, et al. v. *Automated Medical Laboratories, Inc.*, No. 83-1925, June 3, 1985. Also the decision is based on the finding of validity of the regulation of FDA [21 CFR § 101.3(e)] which circumvented necessary action by Congress to amend the FDCA [21 U.S.C. § 343(g)]. Since FDA's regulation is invalid and not supported by the FDCA, there is no basis for preemption. There is no conflict between the provisions of the FDCA and New York law and its regulations.

ARGUMENT

The preemption ruling here has serious and long range consequences for consumers. Congress did not intend to dominate and override the States' authority and duty to protect health and safety. As this Court spoke in *Hillsborough* concerning the reach of FDA regulations:

> "Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulation, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety." *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, supra.

This *Amicus* finds substantial support for the Court to note probable jurisdiction in the reasoning of *Hillsborough* that preemption by the federal government should not be inferred from comprehensive regulation or from its substantial interest in the field of health and safety. Thus even if the FDA regulation [21 CFR 101.3(e)] were valid New York's regulation does not conflict to the extent of preemption because there is no economic inferiority protection for consumers in the

federal regulation, and consumers cannot be misled by including the word imitation on cheese substitute labels. The lower courts appear to agree that the substitute product is economically inferior. The New York State labeling requirement clearly does not confuse nor mislead consumers. It simply goes beyond FDA.

Jurisdiction should be noted by this Court for the reason that the 1973 FDA regulation changed statutory law in meaning and intent. The Court of Appeals found that it would reject the regulation if ruling in 1973 but since Congress has not acted it inferred acquiescence. A change of policy of the magnitude of the 1973 regulation is "inconsistent with clearly expressed Congressional intent."

The FDA regulation on imitation labeling is invalid, however, even if valid, Congress has not preempted the whole field and New York gives consumers added protection.

CONCLUSION

The Court should note probable jurisdiction for these reasons that are of interest and concern to the consumers of many states.

Respectfully submitted,

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